In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-72

MARILYN COOL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Indiana, petitioner and her husband were convicted of possessing and concealing counterfeit money in violation of 18 U.S.C. 472. A third defendant, Robert E. Voyles, pleaded guilty prior to trial and testified for the defense. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence is set forth in the opinion below (Pet. App. 1a-4a). In substance it showed that petitioner, her husband, and Voyles traveled together by car from St. Louis, Missouri, to Brazil, Indiana, where Voyles passed a number of counterfeit bills. Voyles was stopped by local officers as he was entering the Cool vehicle and was arrested. Voyles was placed in the officers' vehicle and the Cools were asked to follow them to the station house. On the way, one Baumunk, a passerby, observed petitioner throw a paper sack from the car in which she was riding. Baumunk recovered the sack, followed the cars to the station house, and turned it over to the officers. It was found to contain counterfeit money. Some five-hundred dollars in genuine currency was found arranged in small pockets in petitioner's purse. At the police station petitioner and the two men gave false names and conflicting versions of their relationship.

Petitioner testified in her own behalf and denied that she was in any way involved in passing counterfeit money or in trying to dispose of it during the trip to the station house, but Voyles was the main defense witness. He admitted that he passed counterfeit money, as the government evidence showed. He testified, however, that neither petitioner nor her husband knew anything of his activities and that they were completely innocent.

2. Petitioner argues here, as she did below, that it was reversible error for the trial court to give a cautionary accomplice instruction over defense objec-

tion (Pet. App. 5a, n. 1), where the alleged accomplice was a defense witness. This argument is without merit. The policy behind the practice of giving a cautionary instruction concerning the testimony of an accomplice is to alert the jury to the possibility of perjury. "When an accomplice testifies for the prosecution he may have an interest in prevaricating in favor of the prosecution to obtain favors or even immunity. * * * On the other hand, when one accomplice testifies for another, there is always the chance that each will try to 'swear the other out of the charge.'" *United States* v. *Nolte*, 440 F. 2d 1124, 1126 (C.A. 5), certiorari denied, 404 U.S. 862.[1]

There is no basis for petitioner's claim that the charge violated her Sixth Amendment "right to present witnesses on her own behalf" (Pet. 13). *Washington* v. *Texas*, 388 U.S. 14, upon which petitioner relies, was concerned not with jury instructions but with a State statute which prohibited an accomplice from taking the stand. But the fact that a witness

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[1] Petitioner mistakenly relies here upon *United States* v. *Harris*, 403 U.S. 573, 583, for the proposition that the admissions of an accomplice "carry their own indicia of credibility" (Pet. 16). The *Harris* case involved the issue of the weight to be given admissions (confidentially made to law enforcement officers) in determining whether probable cause exists for the issuance of a search warrant. This is an entirely different issue from that presented here. As the Court stated in *Harris*: "Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another" (403 U.S. 584).

is not disqualified by his interest in the case or his relationship to the defendant does not necessarily preclude cautionary instructions to the jury regarding a potential motive for perjury. See *Reagan* v. *United States*, 157 U.S. 301, holding that, while a defendant could not be disqualified as a witness because of his interest in the case, the trial court could properly remind the jury that his interest creates a motive for false testimony. As the Fifth Circuit held in rejecting a claim similar to that asserted here (*United States* v. *Nolte*, *supra*, 440 F. 2d at 1126-1127):

> • • • the trial judge's decision whether to give the [accomplice] instruction is not a matter requiring constitutional scrutiny. At most, it is "merely a part of the general conduct of the trial, over which the judge's powers are discretionary, like his control over cross-examination, or his comments on the evidence." *United States* v. *Becker*, 2 Cir. 1933, 62 F. 2d 1007, 1009; *accord*, *Lyles* v. *United States*, 5 Cir. 1957, 249 F. 2d 744, 746, cert. denied, 1958, 356 U.S. 931, 78 S.Ct. 773, 2 L.Ed.2d 761. Whether an accomplice testifies for the prosecution or, as here, for the defense, it is within the trial judge's discretion to instruct the jury to accept an accomplice's testimony with caution.[2]

[2] In the court below petitioner attempted to distinguish *United States* v. *Nolte*, *supra*, on the ground that there one accomplice testified for the defendant and another testified for the prosecution. But the decision in *Nolte* did not turn on this fact. Moreover, as the court below held, "a similar effect was produced here. As indicated, Mr. Voyles' testimony

Petitioner's contention that the charge here "labels both the witness and the defendant as 'accomplices'" and thereby shifts the burden of proof to the defendant (Pet. 11), is without substance. The trial judge expressly instructed the jury that the fact that Voyles pleaded guilty to the offense "in and of itself is not evidence of the guilt of the defendants now being tried, or that a crime was committed" (Pet. App. 5a, n.2). At no time did he state that Voyles and petitioner were accomplices. As the court of appeals held: "The instructions as a whole clearly left issues of credibility solely to the jury. There was no shift, as defendants complain, in the burden of proof" (Pet. App. 6a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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adduced to exonerate the defendants, did nevertheless also provide corroborative detail for the government's case." (Pet. App. 6a).

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